MOST-FAVORED-NATION RELATIONS BETWEEN GERMANY AND THE UNITED STATES.

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THE pending tariff changes in the German Empire have given rise to renewed discussion of the commercial relations between that country and the United States. One of the results of this discussion, carried on in the light of the diplomatic negotiations between the two countries in the last twenty years, has been to call into question the nature of the most-favored-nation relations between the two countries. For hardly any of our commercial treaties has given rise to such divergence of views on the part of the respective Governments as the one which serves to-day as the basis for our commercial relations with the German Empire.

There are two reasons to account for this situation: first, the fact that the treaty in question was concluded by the United States, not with the German Empire, but with the kingdom of Prussia; second, the difference between the German and American interpretations of the most-favored-nation principle.

As to the first: The treaty at present in force was concluded with the King of Prussia on May 1st, 1828. Article XV of the treaty of 1828 provides that "the treaty shall continue in force for twelve years," and, in the absence of an official notification on the part of either party of its intention to terminate the same, "it shall remain binding for one year beyond that time, and so on until the expiration of twelve months which will follow a similar notification, whatever the time at which it may take place."

On January 18th, 1871, Prussia ceased to be an independent State so far as its foreign relations are concerned, and became part of the German Empire. However, since no declaration of an intention to terminate the treaty, as provided

in Article XV, had ever come from either side, the treaty is still considered to be in force. Yet, for purposes of international dealings, Prussia has ceased to exist; moreover, that kingdom has no longer any jurisdiction over the regulation of its foreign commerce, since tariff legislation has been vested in the Imperial Government. Articles 4 and 35 of the Constitution of the German Empire provide that "all matters relating to customs," as well as "legislation as to customs tariffs and commerce," fall within the jurisdiction of the Empire. According to Article 33 of the Constitution, the Empire "forms one customs and commercial territory." The Imperial Government, in line with these provisions, has considered that the treaty with Prussia, as well as the similar treaties between the United States and the Hanseatic republics of Lubeck, Bremen and Hamburg of 1827, and the Kingdom of Hanover of 1846, have now come within the province of Imperial responsibility, and are therefore applicable to the entire Empire. All the claims and discussions of the most-favored-nation relations on the part of the Imperial Government proceed from this assumption.

On the other hand, the United States Government has generally insisted on the strict construction of the original wording of the treaty of 1828. Said Secretary Gresham in 1894, in his otherwise favorable reply to the German protest against the countervailing duty on sugar created by the Wilson act: "The stipulations of these two articles [of the treaty of 1828] place the commercial intercourse of the United States and Prussia, *not the entire German Empire,* on the most-favored-nation basis." Similar views were expressed by his successors, Secretaries Olney and Sherman.

So much for the status of the treaty. As regards the scope of its application, the following two articles, referred to above by Secretary Gresham, form the basis of the most-favored-nation relations between the two countries:

"ARTICLE V—No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Prussia, and no higher or other duties shall be imposed on the importation into the Kingdom of Prussia of any article the produce or manufacture of the United States, than are or shall be payable on the like article, being the produce or manufacture of any other foreign country. . . .

"ARTICLE IX—If either party shall hereafter grant to any other

nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The Germans, following the general diplomatic practice of European countries, have held that the principle laid down in Article V is the regulating factor in most-favored-nation relations between two countries; that is to say, whenever Germany reduces any of her rates of duty on any products coming from a certain country, it unconditionally and immediately extends the same rates to all other countries with which it has most-favored-nation treaties.

The United States, on the contrary, holds that the conditions laid down in Clause IX have a modifying effect on Clause V; that is to say, whenever the United States grants certain reductions of duty to a foreign country in return for similar concessions, these reductions are not extended to favored nations, unless the latter are willing to reciprocate in a similar way.

It is about this difference in interpretation of the principle that the contentions between Germany and the United States have largely centred. To what extent each Government has held consistently to its point of view of the subject will appear from the following review of their relations.

I.

The first test of the most-favored-nation principle under the treaty of 1828, in its application to import duties, did not occur until 1885. On February 10th of that year, Prince Bismarck took occasion, in the course of a debate in the Reichstag, to make the following statement:

"The previous speaker assumed that the United States does not belong to the most-favored nations. As a matter of fact, it does not on the basis of treaties with the Empire, but of those she has with Prussia and other German states which cannot be kept distinct from the Empire. Practically, we treat each other as most-favored nations, a circumstance which furnishes us the reason to claim the same advantages—say, for our sugar imports—in the United States as those granted to Cuba and Porto Rico in the treaty between Spain on behalf of her colonies and the United States, should that treaty be put into effect."

Ten days later, the same principle was recognized by the German Bundesrath, in the ordinance extending the lower rates

granted to imports of rye from Spain to the most-favored nations, among which the United States was expressly included. Whether that was merely a shrewd move on the part of the Iron Chancellor, made with a view to creating a precedent which would strengthen the claims of Germany for most-favored-nation treatment for its sugar by the United States under the provision of our treaty with Spain, in the event of its ratification, may be left an open question. But the question is more than justified in view of the fact that, two years previous to that, when Germany had no occasion to make use of its most-favored-nation privileges in this country, the United States was not treated in the same manner. On October 24th, 1883, the Bundesrath issued an ordinance similar to the one mentioned above, extending the concessions granted to Italy and Spain, in the recently concluded commercial treaties, to the most-favored nations, among which the name of the United States did not appear.

No sooner had Chancellor Caprivi succeeded Prince Bismarck than a new occasion presented itself for testing the most-favored-nation principle in the commercial relations between the two countries. On October 6th, 1890, the McKinley Tariff went into force in the United States. Section 3 of that act placed in the hands of the President the power of retaliation against any country levying discriminating duties on United States products, by authorizing him to impose certain duties on sugar, molasses, coffee, tea and hides. All of these products were placed on the free list. The section was designed principally to secure special concessions from South-American countries for our own products, in return for duty-free admission of the products just mentioned. As Germany, however, had built up an important sugar trade with this country, she was vitally interested in securing duty-free admission of her sugar to the United States.

In the following year, the German Government inaugurated a series of negotiations with several European countries, with a view to the conclusion of commercial treaties for the reciprocal reduction of import duties in their respective tariffs. If the German Government was still of the opinion expressed by Bismarck, that the most-favored-nation principle was the regulating factor in the commercial relations between the United States and the German Empire, there was no other course left for it to pursue but to follow the precedent Bismarck and the Bundesrath had

set in 1885, and to extend to the United States the reduced rates granted to the various European countries.

Germany, however, adopted an entirely different course. In a communication, dated at Saratoga, August 22nd, 1891, the German *Chargé d'Affaires* in this country addressed the Hon. John W. Foster, informing him of the intention of the German Government to remove "the prohibition, promulgated on sanitary grounds in the year 1883, of the importation of hogs, pork and sausage of American origin, in view of recent American legislation for the inspection of meats intended for export." At the same time, the letter stated that "the Imperial Government, in making this declaration, bases its action upon the supposition that, after the abolition of the aforesaid German prohibition of importation, the President of the United States of America will no longer have any occasion for the exercise, as regards the German Empire, of the discretionary powers conferred upon him by the Fifty-first Congress" (that is, under Section 3 of the McKinley act). To emphasize further the fact that the whole transaction was to be in the nature of a bargain, the letter concluded with the following statement:

> "The Imperial Government thinks that it has the greater reason for this assumption, since it is prepared to grant to the United States of America the same reductions in customs duties on agricultural products that have been granted by it (or still are so) to Austria-Hungary and other states during the negotiations for the conclusion of a treaty of commerce that are now being conducted by Germany."

Any reference to the most-favored-nation clause which, according to Bismarck's declaration and German diplomatic practice and precedents, entitled the United States to the reduction of duties granted to Austria-Hungary, is conspicuous by its absence in the letter quoted above. On the contrary, the Imperial Government intimates that "it is prepared" to grant us lower rates, provided the United States will admit German sugar free, making it plain that the concessions are to be mutual. Furthermore, it is not even prepared to grant us all the reductions in duties conceded to Austria-Hungary, but those affecting "agricultural products" only.

The agreement finally concluded between the two countries, proclaimed February 1st, 1892, and known as the Saratoga Con-

vention, was in every respect in conformity with the propositions laid down in the letter of the German *Chargé d'Affaires,* and only agricultural products were included in the list of articles to be admitted to Germany at reduced rates of duty.

That the German Government disregarded its own precedents and avowed principles in the premises, was admitted later on by Baron Marshall von Bieberstein, Secretary of State for Foreign Affairs, who, in a speech before the Reichstag, delivered December 14th, 1894, said:

"*We granted these concessions to the United States without any equivalent in return,* because we were bound by treaty to do so, since, by virtue of Articles V and IX of the Treaty of 1828 concluded between Prussia and the United States, we were bound to extend unconditional most-favored-nation treatment, according to the construction which we have always placed upon that treaty. . . . However, *the preceding speaker is mistaken when he believes we made a free, unconditional gift to the United States* by extending to them, through most-favored-nation treatment, the concession granted to Austria-Hungary. On the contrary, we have secured certain guarantees by the exchange of notes of August 22nd, 1891."

It is only necessary to read in succession the two italicized passages in the above utterance to note the striking contradiction in the speech of the German Secretary. As a matter of fact, neither the most-favored-nation principle nor the treaty of 1828 is in any way, directly or indirectly, mentioned in the notes referred to by the Secretary.

The Saratoga Convention was based, as we have seen, on reciprocity. In return for the German concessions, the United States granted duty-free admission of sugar and a few other products. When, in 1894, the Wilson act removed sugar from the free list and repealed Section 3 of the McKinley act providing for reciprocity, the United States virtually withdrew the concessions it had granted in the Saratoga Convention, and thereby terminated the agreement *de facto,* although no official declaration was made to that effect. Besides placing sugar on the dutiable list, the Wilson act provided for an additional duty of one-tenth of a cent per pound on sugar imported from countries paying an export bounty. In two communications, dated July 16th and August 28th, 1894, addressed by the German Ambassador to the United States, he took occasion to protest against the imposition of the

countervailing duty as "in harmony neither with existing stipulations nor with those tendencies which the exchange of notes of August 22nd, 1891, called forth."

According to the view of the German Government:

"The payment of a bounty is a purely domestic matter, and it is not to be considered in connection with the establishment of duties between states which, like Germany and the United States, sustain the relation of the most-favored nation toward each other. The United States might, for instance, with the same reason, assert that German manufacturers in any particular branch of industry paid lower taxes than elsewhere, and then, in order to bring about a so-called equalization, levy a discriminating duty on the German product concerned, on its importation into an American port. It is quite evident that such a view of the case would render the most-favored-nation clause altogether illusory.

"The Imperial Government feels conscious that it has always conscientiously fulfilled the duties rendered incumbent upon it by the most-favored-nation clause, and it consequently deems itself authorized to expect similar action on the part of the United States of America."

Secretary Gresham thought the points raised by Germany well taken, and advised the President accordingly. On a later occasion, however, when Germany reiterated its protest, Attorney-General Olney pointed out the inconsistency of the German views, recalling the fact that "Germany expressly declared, at the International Sugar Conference of 1888, that the export bounty on sugar of one country might be countervailed by the import duty on sugar of another, without causing any discrimination which could be deemed a violation of the terms of the most-favored-nation clause."

The protest of the German Government, although transmitted by President Cleveland for favorable consideration to Congress, was not heeded by the latter, and the countervailing duty on bounty-fed sugar was applied to the German article.

However, as the Cuban insurrection crippled the sugar industry of that island, the German exports to this country continued to grow, in spite of the increased duty. Nothing was therefore heard from that country again until the Dingley bill raised the countervailing duty to the amount of the export bounty actually paid by any country.

On April 5th and July 28th, 1897, the German Ambassador addressed the Secretary of State, renewing the protest of his predecessor, made in 1894, and embodying it in his own, as against

an action which "is incompatible, both with the most-favored-nation rights that are secured to German products by the treaties in force . . . and with the provisions of the Saratoga agreement of August 22nd, 1891," and intimating that, unless the protests were heeded, his Government would "be confronted with the question whether those advantages should be further continued which it had hitherto extended to the United States by applying to the importations from that country, especially with regard to its agricultural products, the minimum tariff. . . ."

While the German Ambassador was urging his protest at Washington, Baron von Marshall, Secretary of State for Foreign Affairs, made the following statement in the German Reichstag, May 3rd, 1897:

"When the Imperial Government concluded the commercial treaty with Austria-Hungary in 1891, it did not doubt for a moment that it was duty-bound to extend unconditionally to the United States the tariff reductions granted to Austria-Hungary. If, in spite of this clear situation, negotiations were entered upon with the United States which subsequently led to the Saratoga exchange of notes, it was exclusively due to the fact that at the time . . . the McKinley act gave rise to grave doubts as to whether our view as to the right in the matter was reciprocally shared by the other side. . . . In order to secure ourselves in this regard, we entered into negotiations, the result of which was embodied in the exchange of notes at Saratoga. This shows that no new rights, no new obligations, were created by the above exchange of notes . . .; that, in other words, the ultimate aim thereof was to clearly define what form the existing most-favored-nation relations, based on treaty rights, would assume when applied to the new commercial legislation of the two countries."

In other words, realizing that the Saratoga agreement could no longer stand as a reciprocity agreement, the German Foreign Secretary tried to construe it now as merely a declaratory statement, defining more precisely the most-favored-nation relations between the two countries. This view the United States Government refused to entertain, declaring that the agreement, being clearly a reciprocity arrangement, was no longer in force, with the repeal of the McKinley act.

The last occasion for an exchange of views on the most-favored-nation relations between the two countries was furnished by the "Reciprocal Commercial Agreement" concluded between the United States and France, May 28th, 1898. By the terms of

that agreement, each of the contracting parties granted to the other reduced rates of duty on a limited number of articles, the American concessions being based on Section 3 of the Dingley act. Germany now claimed that the same concessions should be extended to German products under the most-favored-nation clause.

Following its usual policy, the United States refused to grant these reductions of duty unconditionally, but expressed its willingness to do so on a basis of reciprocity. This offer finally prevailed, and resulted in the conclusion of a similar agreement with Germany in 1900, by which, in return for the concessions authorized by Section 3 of the Dingley act, Germany extended to the United States her entire minimum tariff.

II.

Having reviewed the German attitude on the subject, we may now turn to the American aspect of the case. I shall confine myself to those cases only which directly affected the scope of application of the most-favored-nation principle.

The first commercial treaty that the United States ever concluded was that with France in 1778. In 1792, Jefferson, in his capacity of Secretary of State, reporting to the President on the negotiations with Spain for a treaty of commerce and navigation, expressed himself against granting any special reductions of duties to Spanish products for this reason: "If we grant favor to the wines and brandies of Spain, then Portugal and France will demand the same; and, in order to create an equivalent, Portugal may lay a duty on our fish and grain, and France a prohibition on our whale oil, *the removal of which will be proposed as an equivalent.*" This passage clearly proves that our first Secretary of State regarded the clause of the French treaty corresponding to Article IX in our treaty with Prussia as having a modifying effect on Clause V. As Jefferson took a direct part in the drawing up of the early treaties, and was moreover associated in his official capacity with the signers of the first treaty in which Clauses V and IX were embodied, it is apparent that what is known as the American interpretation of the most-favored-nation principle is coextensive with the existence of the United States as a nation.

In 1894, Germany protested against the imposition by the United States of a duty on German salt as in conflict with Germany's "rights of the most-favored nation." The matter was

submitted to the Attorney-General for an opinion. Denying the claims made by Germany, he said among other things:

"The most-favored-nation clause of our treaties with foreign Powers has, from the foundation of our Government, been invariably construed, both as not forbidding any internal regulations necessary for the protection of our home industries, and as permitting commercial concessions, and to which no other country is entitled except upon rendering the same equivalents. Thus, Mr. Jefferson, when Secretary of State in 1792, said of treaties exchanging the rights of the most-favored nation that they leave each party free to make what internal regulations they please and to give what preference they find expedient to native merchants, vessels and productions. In 1817, Mr. John Quincy Adams, acting in the same official capacity, took the ground that the most-favored-nation clause only covered gratuitous favors and did not touch concession for equivalents, expressed or implied. Mr. Clay, Mr. Livingston, Mr. Evarts and Mr. Bayard, when at the head of the Department of State, have each given official expression to the same view. It has also received the sanction of the Supreme Court in more than one well-considered decision."

It will be apparent from what has been said that the United States has been consistent throughout in its interpretation of the most-favored-nation principle, although radically at variance in this respect with nearly all the European countries. A noted exception to this rule is furnished by the American-Swiss treaty of 1850, but even that exception could never stand the test of practical application. On June 29th, 1898, the Swiss Minister to the United States addressed the American Government asking it to extend to Swiss imports into the United States the tariff concessions which had just been granted to France. He based his request on the ground that the treaty of November 25th, 1850, entitled Switzerland to the most-favored-nation treatment, and he called attention to the fact that the most-favored-nation clause specified in Articles 8, 9, 10 and 12 of that treaty was "absolutely unlimited."

To this, Mr. Day, then Acting Secretary of State, took exception on the ground "that it is and always has been the view of this Government that a reciprocity treaty is a bargain and not a favor, and that it therefore does not come within the scope of the most-favored-nation clause." But after a further exchange of notes, Secretary Hay, who had in the mean time succeeded Judge Day in office, in his historic reply on No-

vember 21st, 1898, was led, upon "examination . . . of the original correspondence of the American negotiator with his Government," to admit "the equity of the reclamation" presented by the Swiss Government; however, since the treaty with Switzerland, if allowed to stand, would constitute "an exception to the otherwise uniform policy of the United States," he believed it would be necessary "to arrest the operation of the treaty of 1850, or of the clause of said treaty" which referred to the most-favored-nation treatment.

The Swiss claim for reduced rates was accordingly granted; but, after failure to arrive at a common understanding, the clauses referred to were finally abrogated, March 8th, 1899.

Thus, the exceptional most-favored-nation treaty with Switzerland had to be repealed at the first practical test to which it was put. The step taken by the United States Government was unavoidable, if it was to adhere to the established policy of this country. To have left the treaty in force would have made us liable, under Clause IX, to extend *freely* to all favored nations any concessions we might make in the future to some country on a reciprocal basis. This would signify a complete reversal of the historic policy of the United States.

III.

A good deal is to be said in favor of either construction of the most-favored-nation principle. There has been quite a tendency, manifesting itself of late among economic writers in Europe in favor of the American system, as the more expedient and better fitted to protect the interests of a country. A strong argument on the American side is that to extend gratuitously to one country what has been purchased by another country at the cost of equivalent concessions, is manifestly unfair to the latter. To this the advocates of the European view rejoin that the injustice is more apparent than real. If the discriminations were made against one country only, the American argument would be unanswerable. But, when the rule is made applicable to all countries alike, all are benefited, and there is no discrimination. The same is true when the matter is considered from the point of view of the country which grants the concessions. Under the American system, a country which has concessions to make will be able to exact equivalent concessions from every country which desires to

obtain them; while, under the European system, once the concessions are granted to one country, they must be extended gratis to all other countries included among the most-favored nations. On the other hand, the rule, being universally applied, works both ways, and every country becomes not only a dispenser of free favors, but a recipient as well.

There is another and far more important aspect of the question urged by the advocates of unlimited most-favored-nation treatment. Under the American construction of the most-favored-nation principle, a party to a commercial treaty can never be certain as to whether the provisions stipulated therein for safeguarding its interests will not be upset by some new treaty subsequently entered into by the other party with some third country. The United States might, for example, grant a reduced rate on textiles to Germany; if it saw fit, after the conclusion of that treaty, to grant a still lower rate on the same article to France, this obvious discrimination against Germany would be perfectly legitimate under the American construction of the most-favored-nation treatment, and Germany would not be able to get the reduced rate granted to France, except by new bargaining with the United States. Although it actually never occurred in the history of this country, the possibility of such discrimination, which is obviously at variance with the spirit of most-favored-nation practice, is entirely out of the question under the European system of unconditional most-favored-nation treatment.

With the increasing importance of our commercial intercourse with foreign nations, the divergence of the two systems becomes more painfully impressed upon the commercial interests of the latter. The first impulse on their part has been to accept the American construction for their dealings with the United States, while retaining their own in the intercourse between European nations. This may serve to explain the inconsistencies and the vacillations in the otherwise settled commercial policy of Germany, whenever it had to be applied to the United States. However, as pointed out by the late Secretary Hay, such a procedure on their part is impossible, as it would be in conflict with their treaties with this country now in force. Article IX of the treaty with Prussia says that any favor granted by one of the contracting parties to another country shall be extended to the other party "freely, where it is freely granted to such other nation, or on

yielding the same compensation when the grant is conditional." As every European nation, when making concessions to one country, is bound to extend those concessions *freely* to the other European nations, under their construction of the most-favored-nation principle, we are also entitled to the free enjoyment of the same under article IX.

An illustration from current history will make this clear. Germany has just concluded commercial reciprocity treaties with the following seven countries: Austria-Hungary, Russia, Italy, Switzerland, Belgium, Roumania and Servia, all of which gave something in return for those concessions. If Germany stopped there, we could not claim the benefit of the reduced rates unless we were willing to make reciprocal concessions. But, under her most-favored-nation treaties with Great Britain, as well as with several other countries, Germany will extend these concessions to Great Britain, France and several other countries *freely*. This gives the United States the right to claim the benefit of the reduced rates, without giving anything in return. On the other hand, in 1898 we concluded a commercial agreement with France, by which we granted to the latter certain reductions of duty in return for equivalent concessions. When Great Britain claimed the same favor for its products, under the most-favored-nation clause, we refused to grant it. Germany and other countries desiring to obtain the concessions granted by us to France had to conclude special reciprocity treaties with this country, while Great Britain, having no concessions to offer, continues to pay higher rates of duty on certain imports to the United States than other countries, which treat us far less liberally.

It goes without saying that the Europeans are reluctant to accept this situation indefinitely; and, unless the United States should see fit to modify its construction in conformity with the modern European practice, the only way the Europeans see out of the dilemma is to follow the example we set in the case of Switzerland,—namely, to repeal their most-favored-nation treaties with the United States.

Such is the drift of discussion now actively going on in Europe on the subject. What the probability is of either alternative taking shape in the near future remains to be seen.

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